No. 83-1390

In The

Supreme Court of the United States

October Term, 1983

LAVERNE WILLIAM BROWN, JR.,

Petitioner,

v.

ROSAMOND F. BROWN,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's statement of question as presented is *inaccurate* so far as the present case is concerned. Contrary to Petitioner's statement of the case herein presented was not final prior to the effective date of The Uniformed Services Former Spouses Protection Act (February 1, 1983). It is clear by the Statement of Facts as presented by Petitioner, that the case now before the Court was in the state of continuous hearings and appeals throughout the granting of Respondent's Motion for Summary Reversal on August 15, 1983. Thus, any reference to cases final prior to the effective date of The Uniformed Services Former Spouses Protection Act are not determinative so far as the present case is concerned.

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JURISDICTION

The authorities listed in petitioner's Statement of Jurisdiction is not controverted herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Uniformed Services Former Spouses Protection Act Pub.L. 97-252; 10 U.S.C. Section 1006(a) (b), and 1408(c) (1).

STATEMENT OF FACTS

The statement of facts as presented by Petitioner in his Petition For Writ of Certiorari (Pages 4-7) is uncontroverted.

REASONS FOR NOT GRANTING PETITIONER'S WRIT OF CERTIORARI

In May 1975, the date Respondent commenced her action for partition, California law provided that Respondent (hereinafter Mrs. Brown) had a community property interest in Petitioner's (hereinafter Captain Brown) retirement benefits at the time of the original trial of the dissolution action in 1970, and as a result of the trial court's failure to divide those benefits she remained a tenant in common with Captain Brown as to those rights, *In re Marriage of Fithian* (1974) 10 Cal.3d 592.

Respondent prevailed in the action for partition and thereafter this court issued its decision in *McCarty vs. McCarty* (1981) 543 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728, and Congress enacted the Federal Uniformed Services Former Spouses Protection Act (hereinafter USFSPA), 10 U.S.C. Section 1006 and Section 1408, Public Law 97-252.

Captain Brown argues that in accordance with the McCarty decision, California law up to the effective date

of USFSPA, should have characterized military pension rights as the separate property of the servicemen. Accordingly, Captain Brown argues that any characterization of military benefits as community property could not constitutionally be allowed until February 1, 1983, the effective date of USFSPA.

Initially, it must be noted that this case deals with a situation where respondent became owner of a proportionate interest in Captain Brown's retirement benefits by operation of the California law, at the point in time at which the trial court in the dissolution action, failed to make a division of the benefit.

> "Under California law, a spouse's entitlement to a share of the community property arises at the time that the property is acquired. (Civ. Code §§ 5107, 5108, 5110.) That interest is not altered except by judicial decree or an agreement between the parties. Thence 'under settled principles of California community property law, "property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile."' *Henn v. Henn*, 26 Cal.3d 323; 161 Cal.Rptr. 502, 605 P.2d 10."

The substance of the pending action was to partition those property rights created several years earlier by operation of law. This case *does not* involve the process of the court declaring retirement benefits to be community property in a dissolution action.

Captain Brown contends the California courts are bound by *McCarty*, supra in spite of the long line of cases in California Courts of Appeal which have ruled that *McCarty* is not applicable as a result of USFSPA, *In re Marriage of Buikema* (1983) 139 Cal.App.3d 639, *In re Marriage of Frederick* (1983) 141 Cal.App.3d 867, *In re*

Marriage of Camp (1983) 142 Cal.App.3d 217, *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 350, *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24.

Respondent has suggested throughout that in view of this merely being an action to partition existing rights, *McCarty,* supra, was never applicable at all.

The present status of California law regarding the characterization of military pensions was clearly set forth in the Appellate Court decision and *In re Marriage of Sarles,* supra.

> "It is clear that Congress has now provided power to each State through USFSPA to deal with military pensions in the manner in which it had previously treated them or chooses to treat them in the future. Under USFSPA, neither Federal premption nor supremacy of the Federal Government as to military and defense matters are considerations. Because California has regularly applied a community property division to military pensions pre-*McCarty,* and because that power has now been returned to the States by USFSPA, there does not appear to be any proper reason in the present proceeding to act to the contrary."

In re Marriage of Sarles (1983) 143 Cal.App.3d, 30.

The case now before the Court was not final as of the date of the *McCarty* decision (June 1, 1983). The issue is whether or not California is free, in such a case, to apply USFSPA as Congress intended. It is crucial that contrary to the statement of the question presented by petitioner, we are presented here with a case in which the decision was not final. Captain Brown argues that according to *McCarty,* supra, the property characterization of military pensions up to the enactment of USFSPA, Febru-

ary 1, 1983, is to award the military pension benefit to the military service member as his sole and separate property thus he would argue that in 1970 when the dissolution action was before the Court Mrs. Brown had no interest in Captain Brown's military pension and thus has no interest today.

To allow such interpretation, that is to deny the retroactive application of USFSPA, would be to allow the *McCarty* decision to provide a major disruption to the characterization of military pension benefits as applied consistently by California Courts.

If USFSPA is not considered applicable to post-*McCarty* decisions, substantial rights of California litigants would be determined by the vagarities of the calendar or the failure of the litigant to appeal his case.

CONCLUSION

Since the beginning of the present action, the State of Law in California regarding the characterization of military pension benefits has remained constant, not withstanding the momentary effect of *McCarty*, as a result of decisions before *McCarty* and after USFSPA. At the time of filing the action for a partition on May 27, 1975, military pension benefits were clearly community property in accordance with *In re Marriage of Fithian*, supra. During pendency of the present action the McCarty decision of June 1, 1971 held that military pension benefits were the separate property of the service member. The enactment of The Federal Uniformed Services Former Spouses Protection Act clearly expresses Congress' intent that the characterization of military benefits be determined in accordance with State Law.

To disallow California's application of USFSPA and to permit Captain Brown to select the law of a particular period of time which better suits his position, would be to deny Respondent substantial rights afforded California litigants generally and would otherwise throw the State of Law with regard to the characterization of military pension benefits into a state of confusion.

Respondent contends that a constitutional analysis of the propriety of retroactive application of USFSPA is unnecessary. However, any constitutional analysis, if made, must be conducted in light of the State interest served by California's application of USFSPA. The California Supreme Court addressed this issue in its opinion in *In re Marriage of Bouquet* 16 Cal.3d 583.

> "In determining whether a retroactive law contrevenes the due process clause, we consider such factors as the significance of the State interest served by the law, the importance of their retroactive application of the law of the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions."

Other than the twenty months between *McCarty* and the enactment of USFSPA, California law has held that military pension benefits are to be considered as community property. To allow the brief history of the *McCarty* decision to interrupt the history of such characterization of military pension benefits would serve no state interest and in fact would contravene the substantial rights of California litigants whose cases happen to fall within this twenty months of the calendar. In view of the fact that the decision in this case was not final on the ef-

fective date of USFSPA, California Courts are clearly free to apply USFSPA as Congress intended and no constitutional issue or important federal questions are presented.

For these reasons this Court should deny the Petition for Writ of Certiorari here and applied for.

Dated: March 19, 1984

Respectfully submitted,

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